

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of	:	Customer Number: 46320
	:	
Bradford FISHER, et al.	:	Confirmation Number: 9674
	:	
Application No.: 10/672,777	:	Group Art Unit: 2143
	:	
Filed: September 26, 2003	:	Examiner: K. Belani
	:	
For: REAL-TIME SLA IMPACT ANALYSIS	:	

REPLY BRIEF

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Reply Brief is submitted under 37 C.F.R. § 41.41 in response to the EXAMINER'S ANSWER dated May 12, 2008.

The Examiner's response to Appellants' arguments submitted in the Appeal Brief of March 3, 2008, raises additional issues and underscores the factual and legal shortcomings in the Examiner's rejection. In response, Appellants rely upon the arguments presented in the Appeal Brief of March 3, 2008, and the arguments set forth below.

REMARKS

On page 5 of the Appeal Brief, although Appellants pointed out where the Examiner's Answer is required to include particular content, the Examiner has completely ignored this requirement. As noted throughout the prosecution of this application and in the Appeal Brief, the Examiner has failed to properly establish the facts underlying the Examiner's analysis. Moreover, the Examiner appears to be relying upon personal knowledge and not the teachings of the applied prior art in making these rejections without meeting the requirements of 37 C.F.R. § 1.104(d). Appellants' position is that these omissions in the Examiner's prima facie analysis are correctable by the Examiner, and the correction of these omissions would help both Appellants and the Board gain a better understanding of the underlying facts and analysis employed by the Examiner in rejecting the claims. Thus, Appellants respectfully recommend that the Board remand the present application to the Examiner to address these omissions.¹

Also, Appellants have compared the statement of the rejection found on pages 3-17 of the Examiner's Answer with the statement of the rejection found on pages 2-17 of the Second Office Action. Upon making this comparison, Appellants have been unable to discover any substantial differences between the respective statements of the rejection. As such, Appellants proceed on

¹ The Board has persistently declined to uphold an Examiner because of omissions in the Examiner's half of the record. *E.g.*, Ex parte Daleiden, Appeal 2007-1003 (Mar. 14, 2007) (remanding because examiner failed to respond to arguments in the Appeal Brief); Ex parte Rozzi, 63 USPQ2d 1196, 1200-03 (BPAI 2002) (McKelvey, J.) (remanding without decision because of a host of examiner omissions and procedural errors); Ex parte Gambogi, 62 USPQ2d 1209, 1212 (BPAI 2001) (McKelvey, APJ) ("We decline to tell an examiner precisely how to set out a rejection."); Ex parte Jones, 62 USPQ2d 1206, 1208 (BPAI 2001) (McKelvey, APJ) (refusing to adjudicate an issue that the examiner has not developed); Ex parte Schricker, 56 USPQ2d 1723, 1725 (BPAI 2000) ("The examiner has left applicant and the board to guess as to the basis of the rejection ... We are not good at guessing; hence, we decline to guess."); Ex parte Bracken, 54 USPQ2d 1110, 1112-13 (BPAI 1999) (McKelvey, APJ) (noting that the appeal is "not ripe" because of omissions and defects in the examiner's analysis).

the basis that the Examiner's sole response to Appellants' Appeal Brief is found on pages 17-25 of the Examiner's Answer.

Rejection of claim 11 under 35 U.S.C. § 102

Notwithstanding the Examiner's failure to fully and clearly identify all the specific teachings the Examiner is relying upon to allegedly establish that Bartz identically discloses the claimed invention, the Examiner did provide further insight into the Examiner's analysis. Moreover, this additional insights highlight the errors in the Examiner's analysis.

In the second full paragraph on page 18 of the Examiner's Answer, the Examiner proposed the following question:

The examiner would like to know why if server response time is a characteristic of a server; it cannot disclose an underlying server resource?

The response to this question is found on page 7, lines 16-22 of the Appeal Brief.

Instead of addressing each of the arguments presented by the Examiner on pages 18-20 of the Examiner's Answer with regard to claim 11, Appellants will focus on the deficiencies in the Examiner's analysis. Referring to the third full paragraph on page 18 of the Examiner's Answer, the Examiner appears to be asserting that server 1 or server 2 correspond to the claimed "underlying resource." Also referring to the paragraph spanning pages 18 and 19 (and specifically to the portion found on page 19), the Examiner is asserting that server 2 is that server that "may be unable to meets its objective of providing response time" and server 1 falling below a throughput threshold being responsible for server 2 not meeting its objective. Thus, the

Examiner is now appearing to be asserting that server 1 corresponds to the "resource upon which the underlying resource depends" and server 2 corresponds to the "underlying resource."

Assuming that server 2 corresponds to SLO 2, the "performance level" implicated for the underlying resource (allegedly taught by server 2) is "that if the response time is greater than 5 seconds for more than 2 minutes, SLO 2 is violated" (column 9, lines 37-38). Returning again to page 19 of the Examiner's Answer, the Examiner asserted the following:

If server 1, representing a storage server falls below the throughput threshold of 50 KB/sec for 5 minutes (as shown in Fig. 6 and disclosed in the cited column 9, lines 30-67 through column 10, lines 1-12), server 2 representing a web server may be unable to meet its objective of providing response time that does not exceed 5 seconds for 2 minutes, being dependent on the storage server to maintain the specified throughput of 50KB/sec or higher.

The Examiner has erred by mischaracterizing the teachings of Bartz.

Whether or not server 1 meets its throughput threshold (i.e., SLO 1) is immaterial to whether or not server 2 meets its objective (i.e., SLO 2), and the Examiner has failed to identify any substantial evidence that establishes that whether or not server 1 meets SLO 1 affects how server 2 meets SLO 2. Referring to column 9, lines 38-41, Bartz teaches the following:

The overall SLA logical expression is SLO1 AND SLO2. Therefore, if SLO1 and SLO2 are violated, the SLA is non-compliant.

Although compliance of the SLA may be based upon both SLO1 and SLO2 being met, the compliance of SLO 1 being met (i.e., corresponding to the claimed "performance level" implicated for the underlying resource) is not affected by whether or not SLO 2 is being met. Therefore, the Examiner has erred by failing to establish that Bartz identically discloses the claimed "determining whether said event affects said underlying resource in meeting said performance level," as recited in claim 11.

Rejection of claim 1 under 35 U.S.C. § 103

Appellants previously argued that the Examiner has failed to properly characterize the teachings of Main by failing to establish a tie between the claimed "event" and the claimed "specific resource" (i.e., "detecting an event arising from a specific resource."). The Examiner's response to these arguments is found in the paragraph spanning pages 20-21 of the Examiner's Answer. Specifically, the Examiner refers to many different parts of a computer system and concludes by stating "[i]t is these specific resources that the Examiner has cited in his response to arguments in the final office action."

The Examiner's analysis has been hindered by a failure to provide a claim construction for the terms at issue. The claim recites "a specific resource" not "some random resource from a group of resources." However, based upon the Examiner's explicit analysis, the Examiner is referring to an unspecified resource from a number of resources (i.e., processor or CPU, memory, and disk storage.)

In the first full paragraph on page 21 of the Examiner's Answer, the Examiner's findings are allegedly based upon the Examiner's personal knowledge. However, the Examiner has failed to set forth an affidavit or declaration per the requirements of 37 C.F.R. § 1.104(d). Thus, the Examiner's continued reliance upon these findings constitutes legal error.

Even *assuming arguendo* that the Examiner's that "one could easily ascertain an association between an abend code and an underlying resource," the fact that it could be done does not equate to teaching that it should be done. Claim 1 is directed to a method comprising

several steps. Although one could allegedly detect an event arising from a specific resource, the Examiner has not established that Main teaches performing this step. Moreover, the Examiner has not set forth any analysis that would lead one having ordinary skill in the art to conclude the performing this step in the context of the claimed invention would have been obvious. Thus, the Examiner has failed to establish the obviousness of the claimed invention, as recited in claim 1, within the meaning of 35 U.S.C. § 103.

In response to Appellants' arguments on pages 11-13 of the Appeal Brief, the Examiner responded as follows in the paragraph spanning pages 21 and 22:

Continuing to argue about claim 1, appellants present a hypothetical claim on page 12, lines 14-19 that relates to a specific resource; based on the examiner's response that the claim language of claim 1 does not specify what kind of resource is al. and Bartz et al. specify a specific resource (Mainframe computer in Main et al. and servers in Bartz et al. reference). Therefore, the examiner sees no further reason to respond to a hypothetical claim presented.

Even when attempting to ignore Appellants' arguments, the Examiner establishes that the applied prior art does not teach the limitations for which the Examiner is relying upon the applied prior art to teach.

In the above-reproduced passage, the Examiner alleges that the "specific resource" is the mainframe computer of Main. However, in the paragraph spanning pages 20 and 21 of the Examiner's Answer, the Examiner refers to the processor/CPU, memory, and disk storage as the specific resources. As noted above, a specific resource is not a random resource from a collection of resources that the Examiner gets to pick and choose from anytime the phrase "specific resource" is used in a claim. Instead, the specific resource is the same specific resource throughout the claim. By ignoring this limitation, the Examiner has not properly construed the language of the claims.

The Examiner responded to Appellants' arguments on page 13 of the Appeal Brief in the first full paragraph on page 22 of the Examiner's Answer. These arguments refer to the Examiner's reliance upon the teachings in Bartz. In this regard, Appellants incorporate herein, as applying to claim 1, the arguments previously presented with regard to Bartz as to claim 11.

Rejection of claim 4 under 35 U.S.C. § 103

In responding to arguments presented on pages 14 and 15 of the Appeal Brief, the Examiner responded on page 23 and concluded by asking the following:

The examiner would like to know what in the appellants' view is comparable to the service level agreement, if even the definition of SLA (Service Level Agreement) is not comparable to the service level agreement.

The Examiner's question evidences the Examiner's continued failure to properly set forth the underlying facts allegedly supporting the Examiner's rejection. This analysis should have properly been concluded prior to the Examiner making the outstanding Office Action final.

However, to respond to the Examiner's question, column 19, lines 6-8 of Barkan states the following:

SLA--Service Level Agreement--a collection of definitions as for the service level promised to a certain customer.

Thus, SLA definitions are not, in themselves, comparable to a SLA. Instead, based upon the explicit teachings of Barkan and consistent with Appellants' arguments in lines 18-20 on page 15 of the Appeal Brief, an SLA is a collection of SLA definitions.

As to the Examiner's additional assertions in the paragraph spanning pages 23 and 24, Appellants are unclear as to how "[t]his definition implicates selected resources from the map for

a set of users to a plurality of SLAs earlier disclosed" leads to claimed "plurality of SLAs directly implicating selected resources." The Examiner's cited passage of column 6, lines 24-31 does not even refer to a plurality of SLAs. As such, the Examiner has still failed to establish that Barkan teaches all the limitations for which the Examiner is relying upon Barkan to teach.

Regarding Appellants' arguments presented on pages 15 and 16 of the Appeal Brief as to the Examiner's alleged identification, within the applied prior art, of a plurality of management applications, the Examiner responded in the first full paragraph on page 24 of the Examiner's Answer as follows:

Appellants further argue (page 16, line 8) that Barkan et al. reference fails to disclose "a relationship database configured for coupling to a plurality of management applications programmed to manage said selected resources". The examiner had cited the Infrastructure Manager 24 (Fig. 2; column 6, lines 24-31, reproduced above) in the Barkan et al. reference along with the Infrastructure DB shown in Fig. 3. The cited lines disclose the various functions that the Infrastructure Manager 24 is responsible for. In structured programming, it is a common practice to code a manager (main) application, controlling and invoking many other secondary applications, each one of which may perform some specific function. There is no inherency argument used by the examiner, the cited paragraph discloses the same details claimed in the element of claim 4 listed above.

Despite this lengthy passage, the Examiner has still failed to establish that a relationship data is configured to couple to a plurality of management applications. The Examiner asserts that this is "common practice," yet the Examiner provides no evidence of this common practice.

In response to the arguments presented on pages 16 and 17 of the Appeal Brief, the Examiner asserted the following on page 24 of the Office Action:

Continuing with the argument for the next element of claim 4, appellants further assert (page 17, lines 6-7) that Barkan et al. reference does not teach "modeling," as claimed. The examiner begs to differ with this assertion. The process of generating maps of a promised service level for a customer, as disclosed in the cited paragraphs, is certainly considered a modeling function in software industry, as is the use of software packages named engines.

1 The Examiner, yet again, is making assertions that lack any factual support. As admitted by the
2 Examiner use of a model is just "[o]ne way the maps can be generated." Since the Examiner has
3 failed to establish that Barkan explicitly teaches this limitation and the Examiner cannot assert
4 that Barkan inherently teaches this limitation since use of a model is not the only way the maps
5 can be created, Appellants maintain their previously-presented arguments.

6
7 In response to Appellants' arguments on page 18 of the Examiner's Answer, the Examiner
8 responded in the first full paragraph on page 25 of the Examiner's Answer. Despite the
9 Examiner's response, the Examiner has still failed to establish where Barkan teaches the claimed
10 "perform a real-time SLA impact analysis based both upon resources directly implicated by said
11 SLAs and also upon resources which are related to said resources directly implicated by said
12 SLAs." After reproducing Appellants' prior argument, the remaining portion of the Examiner's
13 assertions on page 25 are silent as to the actual limitations of the claims.

For the reasons set forth in the Appeal Brief of March 3, 2008, and for those set forth herein, Appellants respectfully solicit the Honorable Board to reverse the Examiner's rejections under 35 U.S.C. §§ 102, 103.

To the extent necessary, a petition for an extension of time under 37 C.F.R. § 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 09-0461, and please credit any excess fees to such deposit account.

Date: July 14, 2008

Respectfully submitted,

/Scott D. Paul/

Scott D. Paul

Registration No. 42,984

Steven M. Greenberg

Registration No. 44,725

Phone: (561) 922-3845

CUSTOMER NUMBER 46320